No. A-942

93-5256

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

FREDEL WILLIAMSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), bears adequate indicia of reliability to render it admissible under the sixth amendment confrontation clause?

II. Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), constitutes a firmly rooted hearsay exception rendering it presumptively reliable and not subject to further analysis under the sixth amendment confrontation clause?

III. Whether 804(b)(3)'s requirement that a statement must be corroborated by circumstances clearly indicating its trustworthiness, is subject to the further requirement of *Idaho v. Wright*, 497 U.S. 805 (1990), that the only circumstances that can be considered are those surrounding the making of the statement?

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TABLE OF CONTENTS

PAGE(S)

QUESTIONS PRESENTED i

TABLE OF CITATIONS iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION AND RULE INVOLVED 1

STATEMENT OF THE CASE 2

A. Procedural History 2

B. Facts 2

REASONS FOR GRANTING THE WRIT 4

I. THE ELEVENTH CIRCUIT COURT OF APPEALS HAS IMPLICITLY DECIDED A FUNDAMENTAL FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND DECISIONS OF OTHER FEDERAL COURTS OF APPEALS. 4

A. THE CASE LAW OF THE ELEVENTH CIRCUIT WHICH PERMITS THE GOVERNMENT TO INTRODUCE AN INCULPATORY CONFESSION OF AN ACCOMPLICE PURSUANT TO FEDERAL RULE OF EVIDENCE 804(b)(3), BECAUSE IT IS A FIRMLY ROOTED HEARSAY EXCEPTION, CONFLICTS WITH ***LEE V. ILLINOIS***, 476 U.S. 530 (1986), AND THE OPINIONS OF OTHERS FEDERAL COURTS OF APPEALS 7

B. THE CASE LAW OF THE ELEVENTH CIRCUIT, WHICH PERMITS THE GOVERNMENT TO INTRODUCE THE INCULPATORY CONFESSION OF AN ACCOMPLICE PURSUANT TO FEDERAL RULE OF EVIDENCE 804(b)(3) IF ITS TRUSTWORTHINESS DEMONSTRATED BY INDEPENDENT CORROBORATING EVIDENCE CONFLICTS WITH *IDAHO V. WRIGHT*, 497 U.S. 805 (1990), AND OPINIONS OF OTHER FEDERAL COURTS OF APPEALS 11

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TABLE OF CONTENTS (Continued)

PAGE(S)

II. THE ELEVENTH CIRCUIT COURT OF APPEALS HAS, BY AFFIRMING THE DISTRICT COURT'S RULING ADMITTING AN UNRELIABLE INCULPATORY CONFESSION OF A NON-TESTIFYING ACCOMPLICE, SO FAR SANCTIONED THE LOWER COURT'S DEPARTURE FROM THE ACCEPTABLE AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER 12

CONCLUSION 15

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TABLE OF CITATIONS

CASES — PAGE(S)

Bruton v. United States
391 U.S. 123 (1968) 7-9, 14

California v. Green
399 U.S. 149 (1970) 5

Chambers v. Mississippi
410 U.S. 284 (1973) 13

Davis v. Alaska
415 U.S. 308 (1974) 5

Douglas v. Alabama
380 U.S. 415 (1965) 7, 14

Fuson v. Jago
773 F.2d 55 (6th Cir. 1985) 10, 14

Idaho v. Wright
497 U.S. 805 (1990) . . . . . i, 6, 11, 13, 14

Jennings v. Maynard
946 F.2d 1502 (10th Cir. 1991) 10

Kruelwitch v. United States
336 U.S. 440 (1949) 13

Lee v. Illinois
476 U.S. 530 (1986) 5, 7-10, 12, 14

Morrison v. Duckworth
929 F.2d 1180 (7th Cir. 1991) 10, 14

Ohio v. Roberts
448 U.S. 56 (1980) 5, 6

Pointer v. Texas
380 U.S. 400 (1965) 5

ROBBINS, TUNKEY, ROSS, AMSEL & RABEN, P.A., ATTORNEYS AT LAW
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CASES — PAGE(S)

United States v. Boyce
849 F.2d 833 (3d Cir. 1988) 14

United States v. Flores
985 F.2d 770 (5th Cir. 1993) 6, 10, 12, 14

United States v. Gomez-Lemos
939 F.2d 326 (6th Cir. 1991) 14

United States v. Harrell
788 F.2d 1524 (11th Cir. 1986) 13

United States v. Harty
930 F.2d 1257 (7th Cir. 1991) 12

United States v. Johnson
802 F.2d 1459 (DC Cir. 1986) 14

United States v. Lilley
581 F.2d 182 (8th Cir. 1978) 10

United States v. Magna-Olvera
917 F.2d 401 (9th Cir. 1990) 10, 14

United States v. Palumbo
639 F.2d 123 (3d Cir.), *cert.denied*,
454 U.S. 819 (1981) 10, 13, 14

United States v. Riley
657 F.2d 1377 (8th Cir. 1981), *cert.denied*,
459 U.S. 111 (1983) 10, 14

United States v. Robinson
635 F.2d 363 (5th Cir. unit B), *cert.denied*,
452 U.S. 961 (1981) 13

United States v. Sarmiento-Perez
633 F.2d 1092 (5th Cir. unit A 1981) 13, 15

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CASES — PAGE(S)

United States v. Seeley
892 F.2d 1 (1st Cir. 1989) 10

United States v. Taggart
944 F.2d 837 (11th Cir. 1991) 9-11

United States v. Vernor
902 F.2d 1182 (5th Cir. 1990) 10

United States v. York
933 F.2d 1343 (7th Cir. 1991) 10, 12

Vincent v. Parke
942 F.2d 989 (6th Cir. 1991) 14

OTHER AUTHORITIES

Federal Rule of Evidence 801(d)(2)(E) 13

Federal Rule of Evidence 804(b)(3) ..... i, 1, 7, 9-11

United States Code 28 section 1254(1) 1

United States Constitution, Sixth Amendment ..... i, 1, 2, 4, 6, 12

Wigmore, *Evidence* §1395 at 123 (3d ed. 1940) 5

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OPINION BELOW

The unpublished opinion of the United States Court of Appeals, Eleventh Circuit; is reproduced in the Appendix (hereinafter "A") at page 1. The rulings by the District Court which the court of appeals affirmed are reproduced at A-2-6.

JURISDICTION

The judgment to be reviewed was entered on December 23, 1992. A-1. Mr. Williamson's Suggestion of Rehearing *En Banc* was denied on March 24, 1993. A-7. By order dated June 16, 1993, this Court granted Mr. Williamson's Application for Extension of Time to File Petition for Writ of Certiorari to July 15, 1993. Jurisdiction is conferred on this Court by 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

Confrontation Clause of the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ....

Federal Rule of Evidence 804(b)(3):

> Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

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STATEMENT OF THE CASE

A. Procedural History

Mr. Williamson and co-defendant Reginald Harris were charged in the Middle District of Georgia with conspiring to possess with intent to distribute cocaine, possession with intent to distribute the cocaine, and interstate travel for the purpose of promoting and carrying on the unlawful activity of distributing cocaine. Prior to trial, the government moved to sever the defendants asserting that it intended to introduce post-arrest statements of Harris that would incriminate Mr. Williamson. The government conceded that the introduction of the statements would violate Mr. Williamson's sixth amendment right to confrontation. The district judge granted the motion.

At Mr. Williamson's trial, the government called Harris as a witness. Contrary to the position it took previously, after co-defendant Harris invoked his fifth amendment privilege, was granted immunity, and persisted in his refusal to testify, the government proffered Harris's post-arrest statements through a DEA agent. Mr. Williamson interposed timely hearsay and confrontation clause objections. The district judge overruled all objections and related motions for mistrial.

The jury found Mr. Williamson guilty on all three counts. The district judge adjudicated him guilty and sentenced him to 327 months imprisonment.

B. Facts

After seeing the wheels of co-defendant Harris's vehicle veer off the interstate highway, a deputy sheriff stopped him to investigate. After obtaining consent to search, the deputy discovered 19 kilograms of cocaine in two pieces of luggage in the trunk. Harris was

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immediately arrested.

After being in custody for approximately one hour and being advised that any cooperation he provided would be relayed to the prosecuting attorney, Harris was interrogated telephonically by a DEA agent. The agent testified at trial that during this interrogation, Harris told him that the cocaine seized from his vehicle was acquired by Mr. Williamson, that it belonged to Mr. Williamson, and that he was supposed to deliver it in a dumpster later that night in Atlanta.

Harris was interrogated a second time by the agent, this time in person, after being in custody for approximately six and one-half hours. After Harris was again told that any cooperation he provided would be documented and relayed to the prosecutor, the agent testified at trial that Harris stated he had rented his automobile several days before and had driven it to Ft. Lauderdale, Florida, to meet Mr. Williamson. The agent testified that Harris told him he acquired the cocaine in Ft. Lauderdale from a cuban acquaintance of Mr. Williamson who placed the cocaine in the trunk and left written instructions on how to deliver it. When Walton pressed Harris to assist with a controlled delivery, Harris stated he had lied about the delivery to the trash dumpster, the pick-up from the cuban, and the note regarding the delivery instructions. The agent testified that Harris now stated he was delivering the cocaine to Mr. Williamson in Atlanta but that any controlled delivery would be impossible because Mr. Williamson had been travelling in front of him at the time of his arrest and would have observed the entire event.

Harris's post-arrest statement was clearly the linchpin evidence against Mr. Williamson. From the car, the government introduced a piece of luggage which bore the

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initials "D.L.W." Mr. Williamson's sister's name was Deborah Lynn Williamson. An envelope addressed to Fredel Williamson was found inside the glove compartment. A United States Parcel Post receipt in the name of Mr. Williamson's girlfriend, Clara Marlow, was found in the glove compartment. Fredel Williamson was listed as an additional driver on the rental agreement signed by Harris. However, no finger prints of Mr. Williamson were found in the vehicle or upon any of its contents.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS HAS IMPLICITLY DECIDED A FUNDAMENTAL FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND DECISIONS OF OTHER FEDERAL COURTS OF APPEALS.

The Eleventh Circuit Court of Appeals' *per curiam* decision below, though brief in length, is fraught with error. Behind it lies Mr. Williamson's conviction which the government secured based on the post-arrest confession of a non-testifying alleged accomplice. The circumstances surrounding the making of this statement overwhelmingly confirmed its presumptive unreliability. The Eleventh Circuit's apparent analysis of this testimony, consistent with another opinion it has rendered, conflicts with the applicable decisions of this Court as well as the other courts of appeals. A careful analysis of the leading decisions in other circuits demonstrate that the federal appellate courts are hopelessly conflicted by this common but crucial issue. A unifying decision from this Court is direly needed.

The sixth amendment's confrontation clause guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him. The main essential purpose of confrontation is to secure for the opponent the opportunity of cross-

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examination." ***Davis v. Alaska***, 415 U.S. 308, 315-16 (1974)(quoting 5J. Wigmore, *Evidence* §1395 at 123 (3d ed. 1940). "There are few subjects, perhaps, upon which [the United States Supreme] Court and other courts have been more nearly unanimous than in the expression of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of a fair trial which is this country's constitutional goal." ***Pointer v. Texas***, 380 U.S. 400, 405 (1965).

The right to confront and cross-exam adverse witnesses serves symbolic and functional goals. First, the confrontation clause advances the perception of fairness by "insuring that convictions will not be based on the charges of unseen and unknown - and hence unchallengeable - individuals. ***Lee v. Illinois***, 476 U.S. 530, 540 (1986). It condemns the injustices wrought by the notorious Star Chamber of 17th Century England. Second, it promotes reliability in criminal trials. As this Court observed in ***California v. Green***, 399 U.S. 149 (1970), confrontation

> (1) insures that the witness will give his statement under oath - thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Id. at 158.

In ***Ohio v. Roberts***, 448 U.S. 56 (1980), this Court set forth the general framework for determining when incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause. As this Court restated in

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Idaho v. Wright, 497 U.S. 805 (1990):

> First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. "In the usual case ..., the prosecution must either produce or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. ..." Second, once a witness is shown to be unavailable, "his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."

Id. at ____ (quoting ***Ohio v. Roberts***, 448 U.S. at 65-66). With regard to this latter requirement, this Court in ***Wright*** clarified that in demonstrating the trustworthiness of such a hearsay statement, a court may only consider those circumstances surrounding the making of the statement and that rendered the declarant particularly worthy of belief, not the totality of circumstances that may have been proved at trial. *Id.* at ____.

According to the foregoing analysis, as the court observed in ***United States v. Flores***, 985 F.2d 770 (5th Cir. 1993), there are two paradigms for analyzing the constitutionality of statements offered as hearsay exceptions. Under both, the confrontation clause requires the government to show that the declarant is unavailable and the statement bears adequate indicia of reliability. *Id.* at 775. If the hearsay falls within a firmly rooted hearsay exception, reliability may be presumed. If not, reliability must be shown from particularized guarantees of trustworthiness derived only from those circumstances surrounding the making of the statement and that render the declarant particularly worthy of belief. *Id.*

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A. THE CASE LAW OF THE ELEVENTH CIRCUIT WHICH PERMITS THE GOVERNMENT TO INTRODUCE AN INCULPATORY CONFESSION OF AN ACCOMPLICE PURSUANT TO FEDERAL RULE OF EVIDENCE 804(b)(3), BECAUSE IT IS A FIRMLY ROOTED HEARSAY EXCEPTION, CONFLICTS WITH *LEE V. ILLINOIS*, 476 U.S. 530 (1986), AND THE OPINIONS OF OTHERS FEDERAL COURTS OF APPEALS.

In a long line of cases, this Court has recognized that the "truth-finding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." *Lee*, 476 U.S. at 541. Thus, in *Douglas v. Alabama*, 380 U.S. 415 (1965), this Court reversed the defendant's conviction because a confession purportedly made by the non-testifying accomplice, which implicated the defendant, was read to the jury by the prosecutor. This Court held that the defendant's "inability to cross examine [the accomplice] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." *Id.* at 419. The holding was premised on the understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination.

Likewise, in *Bruton v. United States*, 391 U.S. 123 (1968), this Court reversed the defendant's conviction based on the jury hearing the confession of his non-testifying co-defendant which implicated him. Despite a limiting instruction, this Court concluded that the introduction of the co-defendant's uncross-examined confession violated the defendant's right of confrontation. *Id.* at 135. After noting the "inevitably suspect" credibility of an

accomplice's inculpatory statements about his alleged co-conspirator, this Court declared that the unreliability of such a confession is "intolerably compounded" when the alleged accomplice "does not testify and cannot be tested by cross-examination." *Id.* at 136.

In the most recent case, this Court held in *Lee v. Illinois* that the trial judge's reliance upon the post-arrest confession of a non-testifying accomplice in sustaining the defendant's conviction was reversible error. In a murder case in which only one bullet had been fired, the accomplice fingered the defendant as the triggerman. The Court recognized that due to a co-conspirator's "strong motivation to implicate the defendant" in order "to shift or spread blame, curry favor, avenge himself, or divert attention to another," a co-conspirator's post-arrest statements about the defendant's involvement in the crime must be viewed with "special suspicion." *Id.*, 476 U.S. at 541, 545. "[O]nce partners in crime recognize that the 'jig is up,' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices." *Id.* at 544-45.

Before analyzing and rejecting Illinois's contention that the circumstances surrounding the confession rebutted the presumption of unreliability, this Court summarily rejected Illinois's assertion that the statements at issue bore sufficient indicia of reliability because they fell within a firmly rooted hearsay exception: "We reject respondent's categorization of the hearsay involved in this case as a simple declaration against penal interests. That concept defines too large a class for meaningful confrontation clause analysis. We decide this case as involving a confession by an accomplice which incriminates

a criminal defendant." *Id.* at 544 n.5[1] *Accord* ***Bruton v. United States***, 391 U.S. 123, 128 n.3 (1968). While not creating a per se rule of inadmissibility, these cases make clear that such statements rarely, if ever, qualify for admission. *See* Fed.R.Evid. 804(b)(3), Notes of Advisory Committee on 1972 Proposed Rules.

Although silent on its face, the Eleventh Circuit's opinion below affirming Mr. Williamson's conviction and admission of the hearsay statements against him allows for two possible explanations: either the court concluded that Harris's confession inculpating Mr. Williamson and offered as a declaration against penal interest of an unavailable declarant under Rule 804(b)(3) was a firmly rooted exception requiring no further corroboration, or that it was not a firmly rooted exception but that its presumptive unreliability had been rebutted by a showing of particularized guarantees of trustworthiness. The court's decision and analysis in ***United States v. Taggart***, 944 F.2d 837 (11th Cir. 1991), indicates the court's ruling instanter may well have been based on an erroneous conclusion, directly contrary to ***Lee***, that a confession by an accomplice which incriminates a criminal defendant is properly admissible under 804(b)(3) and passes muster under the confrontation clause because it

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[1] Even the dissenting justices in *Lee* recognized this distinction:

> Indeed, accomplice confessions ordinarily are untrustworthy precisely because they are *not* unambiguously adverse to the penal interests of the declarant. It is of course against one's penal interest to confess to criminal complicity, but often that interest can be advanced greatly by ascribing the bulk of the blame to one's confederates. It is in circumstances raising the latter possibility - circumstances in which the accomplice's out-of-court statements implicating the defendant may be very much in the accomplice's penal interests - that we have viewed the accomplice's statements as "inevitably suspect."

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"falls within a firmly rooted hearsay exception." *Id.* at 840.

The federal circuit courts of appeals are sharply divided on the meaning of ***Lee*** and whether inculpatory confession's of accomplices offered as statements against penal interest fall within a firmly rooted hearsay exception. Panels of the First, Tenth and Eleventh Circuits have expressly concluded that such statements do fall within a firmly rooted hearsay exception. ***United States v. Seeley***, 892 F.2d 1, 2 (1st Cir. 1989); ***Jennings v. Maynard***, 946 F.2d 1502, 1505 (10th Cir. 1991); ***Taggart***, 944 F.2d at 840. The Fifth Circuit has expressly held that inculpatory confessions of accomplices offered under 804(b)(3) do not fall within a firmly rooted exception. ***United States v. Flores***, 985 F.2d 770, 775 (5th Cir. 1993); ***United States v. Vernor***, 902 F.2d 1182, 1186-87 (5th Cir. 1990). The Seventh Circuit has held that, though Rule 804(b)(3) is generally a firmly rooted exception, ***United States v. York***, 933 F.2d 1343, 1363 (7th Cir. 1991), where the statement being offered is an inculpatory confession of a non-testifying accomplice, the statement does not constitute a firmly rooted exception. ***Morrison v. Duckworth***, 929 F.2d 1180, 1182 n.2 (7th Cir. 1991). The Third, Sixth, Eighth, and Ninth Circuits take the view that inculpatory confessions of non-testifying accomplices are inadmissible because they fail to even meet Rule 804(b)(3)'s requirement that the statement be against the declarant's penal interest. ***United States v. Palumbo***, 639 F.2d 123, 127-28 (3d Cir.), *cert.denied*, 454 U.S. 819 (1981); ***Fuson v. Jago***, 773 F.2d 55, 60-61 (6th Cir. 1985); ***United States v. Riley***, 657 F.2d 1377, 1383-85 (8th Cir. 1981), *cert.denied*, 459 U.S. 111 (1983); ***United States v. Lilley***, 581 F.2d 182 (8th Cir. 1978); ***United States v. Magna-Olvera***, 917 F.2d 401, 407-09 (9th Cir. 1990). Guidance from this Court is needed to bring these cases into line.

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B. THE CASE LAW OF THE ELEVENTH CIRCUIT, WHICH PERMITS THE GOVERNMENT TO INTRODUCE THE INCULPATORY CONFESSION OF AN ACCOMPLICE PURSUANT TO FEDERAL RULE OF EVIDENCE 804(b)(3) IF ITS TRUSTWORTHINESS DEMONSTRATED BY INDEPENDENT CORROBORATING EVIDENCE CONFLICTS WITH *IDAHO V. WRIGHT*, 497 U.S. 805 (1990), AND OPINIONS OF OTHER FEDERAL COURTS OF APPEALS.

If the Eleventh Circuit in the instant case did not affirm Mr. Williamson's conviction based on an erroneous conclusion that Harris's post-arrest confession implicating Mr. Williamson was inherently reliable as a firmly rooted exception to the hearsay rule, then it must have done so based on equally erroneous reasoning, contrary to this Court's decision in ***Idaho v. Wright***, that the "totality of the circumstances" established sufficient indicia of reliability. As may be apparent and will be explained in greater detail *infra*, the circumstances that surrounded the making of Harris's statement and reflected on his credibility in making the statement, only confirmed the judicial presumption of unreliability. Thus, the court could only have looked to other evidence introduced at trial to rebut the presumption of unreliability. Moreover, the Eleventh Circuit's opinion in ***Taggart*** demonstrates that, notwithstanding the rule of ***Idaho v. Wright***, the court continues to look to the totality of the evidence introduced at trial in determining the reliability of such hearsay statements. ***Taggart***, 944 F.2d at 840.

With regard to the other circuits' interpretation of ***Idaho v. Wright***, some courts have superimposed the limitation on the circumstances that can be examined to determine reliability upon Rule 804(b)(3)'s requirement that a statement, to be admissible, must be supported by circumstances which "clearly indicate the trustworthiness of the statement.

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E.g., ***United States v. Flores***, 985 F.2d 770, 774-77 (5th Cir. 1993); ***United States v. York***, 933 F.2d 1343, 1360-64 (7th Cir. 1991). Other circuits analyze the totality of the circumstances under the rule but then limit the analysis to circumstances surrounding the making of the statement to insure compliance with the sixth amendment. *E.g.*, ***United States v. Harty***, 930 F.2d 1257, 1262-65 (7th Cir. 1991). Guidance from this Court is also needed to align the circuits on this important issue.

II. THE ELEVENTH CIRCUIT COURT OF APPEALS HAS, BY AFFIRMING THE DISTRICT COURT'S RULING ADMITTING AN UNRELIABLE INCULPATORY CONFESSION OF A NON-TESTIFYING ACCOMPLICE, SO FAR SANCTIONED THE LOWER COURT'S DEPARTURE FROM THE ACCEPTABLE AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The decision of the Eleventh Circuit Court of Appeals below, affirming the district court's ruling admitting the inculpatory confession of Mr. Williamson's non-testifying accomplice against him, was unjustified. The decision resulted in a wholesale denial of Mr. Williamson's invaluable right to confront his accusers. It contravened firm doctrine established by this Court and applied by the other federal circuit courts of appeals. It resulted in a gross miscarriage of justice.

The district court was utterly confounded by the evidentiary and constitutional issues presented by Mr. Williamson's objection to the hearsay against him. In its first "pass" at the issue, the court appeared to conclude it was trustworthy simply because he found it to have been voluntary. A-3. This Court stated in ***Lee*** that the voluntariness of a post-arrest confession does not even bear on its trustworthiness for confrontation clause purposes. *Id.*, 476 U.S. at 544 (1986). Second, the court relied on the totality of "corroborating

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circumstances" to justify its ruling. A-3. This Court's decision in ***Idaho v. Wright***, decided prior to the decision below, prohibits such a wide-ranging inquiry. Finally, the district court based its analysis on the case of ***United States v. Robinson***, 635 F.2d 363 (5th Cir. unit B), *cert.denied*, 452 U.S. 961 (1981). A-2-3. This case was materially distinguishable because the declarant was not in custody at the time of his confession. The court, also, impermissibly relied upon the totality of the evidence introduced against the defendant at trial to supply the necessary corroboration for the statement. *Id.*, 635 F.2d at 364.

Upon its second pass at the issue, the district court justified introduction of Harris's uncross-examined confession under the co-conspirator exception to the hearsay rule. *See* Fed.R.Evid. 801(d)(2)(E). A-4-5. However, the law is clear that statements of a co-conspirator made to law enforcement following the co-conspirator's arrest are not admissible under this hearsay exception. *See* ***Kruelwitch v. United States***, 336 U.S. 440, 443-45 (1949).

Upon the district court's third pass at the issue, it again relied upon a case, ***United States v. Harrell***, 788 F.2d 1524 (11th Cir. 1986), A-6, that is materially distinguishable. In ***Harrell***, the declarant gave the statement spontaneously to an undercover agent whom he believed was a confederate. *Id.* at 1527. Such spontaneous statements, when made to friends or confederates, are universally recognized to have special guarantees of trustworthiness. *See, **Chambers v. Mississippi***, 410 U.S. 284, 300 (1973), ***United States v. Palumbo***, 639 F.2d 123, 133 (3d Cir.), *cert.denied*, 454 U.S. 819 (1981); ***United States v. Sarmiento-Perez***, 633 F.2d 1092 (5th Cir. unit A 1981), *cert.denied*, 459 U.S. 834 (1982). Harris's statement was made to law enforcement following his arrest. Additionally, the court in ***Harrell***, as with the court in ***Robinson***, relied upon other evidence introduced at trial

to corroborate the hearsay statements. ***Wright*** prohibits consideration of such evidence to establish trustworthiness.

The Eleventh Circuit Court of Appeal's decision below cannot be justified on any other basis. Harris's confession was made under precisely those circumstances which this Court has repeatedly held are highly suspect and render the statement presumptively unreliable. ***Lee***; ***Bruton***; ***Douglas***. Additionally, the circumstances surrounding the statement uniformly and overwhelmingly confirmed its unreliability. The statements were made after one and six and one-half hours in custody, respectively. They were made in response to interrogation and upon Harris being advised that any cooperation would be relayed to the prosecutor. The statements Harris made were contradictory. They were consistent only inasmuch as they minimized Harris's involvement as that of a mule and Mr. Williamson's involvement as the purchaser, owner, and recipient of the cocaine. Harris refused to give a written statement and was concerned about his oral statement being tape recorded. The decisions of other circuit courts of appeal uniformly recognize that such hearsay statements are inadmissible and violative of a defendant's confrontation rights. *E.g.*, ***United States v. Flores***, 985 F.2d 770 (5th Cir. 1993); ***Vincent v. Parke***, 942 F.2d 989 (6th Cir. 1991); ***United States v. Gomez-Lemos***, 939 F.2d 326 (6th Cir. 1991); ***Morrison v. Duckworth***, 929 F.2d 1180, 1182 n.2 (7th Cir. 1991); ***United States v. Magna-Olvera***, 917 F.2d 401, 408-09 (9th Cir. 1990); ***United States v. Boyce***, 849 F.2d 833 (3d Cir. 1988); ***United States v. Johnson***, 802 F.2d 1459, 1464-65 (DC Cir. 1986); ***Fuson v. Jago***, 773 F.2d 55, 60 (6th Cir. 1985), *cert.denied*, 478 U.S. 1020 (1986); ***United States v. Riley***, 657 F.2d 1377, 1383-85 (8th Cir. 1981), *cert.denied*, 459 U.S. 111 (1983); ***United States v. Palumbo***, 639 F.2d 123, 127-28 (3d Cir.), *cert.denied*, 454

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U.S. 819 (1981); ***United States v. Sarmiento-Perez***, 633 F.2d 1092, 1101-02 (5th Cir. unit A 1981), *cert.denied*, 459 U.S. 834 (1982).

Mr. Williamson's conviction rests upon the hearsay statements of an uncross-examined co-defendant who implicated Mr. Williamson following his arrest under circumstances providing him every possible incentive to blame Mr. Williamson. Admitting these statements into evidence violated Mr. Williamson's confrontation rights and compromised the trial's truth-seeking function. The decision of the court below, summarily affirming the trial court's admission of these inherently unreliable statements, conflicts with decisions of this Court and those of the other federal circuit courts of appeals. Thus, the decision of the court below has so far departed from the acceptable and usual course of judicial proceedings and requires the exercise of this Court's supervisory power.

CONCLUSION

For these reasons, the Petitioner respectfully prays that this Court grant its Writ of Certiorari.

Respectfully submitted,

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By: Benjamin S. Waxman
BENJAMIN S. WAXMAN

No. A-942

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

FREDEL WILLIAMSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEAL

APPENDIX

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TABLE OF CONTENTS

	PAGE(S)
Eleventh Circuit Court of Appeal Opinion	1
District Court Ruling Admitting Post Arrest Custodial Statements of unavailable declarant that inculpated Mr. Williamson	2-3
District Court Ruling Confirming Admission of Post-Arrest Custodial Statements of unavailable declarant	4-5
District Court Ruling Reaffirming Admission of Post-Arrest Custodial Statements of unavailable declarant	6
Order Denying Petition for Rehearing and Suggestion of Rehearing *En Banc*	7

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DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-8938
Non-Argument Calendar

D. C. Docket No. CR-89-37

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FREDEL WILLIAMSON, a/k/a "FRED",

Defendant-Appellant.

Appeal from the United States District Court
For the Middle District of Georgia

(December 23, 1992)

Before TJOFLAT, Chief Judge, HATCHETT and ANDERSON, Circuit Judges.

PER CURIAM:

Affirmed. See Circuit Rule 36-1.

Judgment Entered: December 23, 1992
For the Court: Miguel J. Cortez, Clerk

By: Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: APR 07 1993

(1)

wouldn't sign any documents, any forms.

Q Did you quit questioning him at that point?

A Abruptly. It stopped and it was over.

Q Now, while he was talking to you, did he tell you he was scared of Fredel Williamson and other people involved in this?

A He stated he was scared not only for himself but for his mother, frightened that they would be, either he or his mother would be killed, that Williamson knew where both he and his mother resided, they lived together.

Q He lived with his mother?

A According to Mr. Harris, yes, ma'am.

Q And did he complain to you about any, any agent having threatened him or any deputy having harmed him in any manner?

A No, ma'am.

Q His only fear was to Fredel Williamson and the other people related to the drug conspiracy, is that correct?

A The only fears he expressed to me, yes, ma'am.

MS. FOWLER: One moment, Your Honor. Nothing further, Your Honor.

THE COURT: Anything further, Mr. Silver?

MR. SILVER: Nothing further, Judge, thank you.

THE COURT: All right. It is the ruling of the Court that the necessary corroborating circumstances as spelled out in the case of United States versus Robinson, 635

F 2nd 363 have been met by the Government. It is clear to me that Agent Walton read him his Miranda rights. He was in custody. However, it does not appear that there was any coercion. The fact he had been in custody for six or seven hours does not give this Court any concern. The Court notes that he was in custody here in the federal courthouse in Macon, and this Court knows that the facilities here and the way prisoners are treated in this courthouse generally comply with all aspects of requirements of the various Supreme Court decisions, and so the presumption is that he was not under any, as far as I'm concerned, as far this Court is concerned, under any coercion or under such circumstances that he would not give a voluntary statement.

For that, and just based on the testimony of the agent in total, and there is a record here of it in case any appellate court ever needs to look at it, this Court finds that the corroborating circumstances clearly indicate the trustworthiness of the statement. So, when we begin in the mornings, I will, we will begin, I assume, with this agent's testimony.

Anything further before we adjourn for the day?

MS. FOWLER: Not for the Government.

MR. SILVER: Judge, on behalf of the Defendant Williamson, in reviewing that information which we have obtained from the Government by way of discovery, we are

conspiracy had ended when one of them is ar.)ted, as to the one arrested. It doesn't necessarily end as to the others. It is offered under the unavailable exception, and the Court has gone through all the predicates of reliability and the Court has ruled that it is coming in under that unavailable exception to the hearsay requirement, and the cases --

THE COURT: I know, but that is not the question that I have already ruled on. I want to know, does it make any difference that he, that the testimony that is offered was made, the conversation was had after the conspiracy had terminated? Does that make any difference?

MS. FOWLER: No, sir.

THE COURT: Why?

MS. FOWLER: Because it is in under a different rule. We are not offering it during the pendency of the conspiracy. We are offering it under the unavailable.

THE COURT: Well, I don't think you understand what I'm saying.

MS. FOWLER: The Court --

THE COURT: My feeling is this, is that it is, although the conversation, the interview was, with Agent Walton and Mr. Harris, was made after the conspiracy terminated, that it involved the gist of the conversation, it involved -- the gist of the conversation dealt with things that happened during the pendency of the conspiracy.

Therefore, he can recount what Williamson may have done or the two of them may have done together or planned together or did together at a time before the arrest. Anything he says about Williamson, that happened after the termination of the conspiracy, if there is any such thing, and as I recall what the agent said, it all dealt with that part that, that whatever they did in planning and so forth. That is what, I think Mr. Silver's motion was that the mere fact that a conspiracy had terminated, means that anything he says after the termination of the conspiracy is inadmissible. That is your point, isn't it, Mr. Silver?

MR. SILVER: Yes, Judge. It is admissible as to Mr. Harris.

THE COURT: But not against any other?

MR. SILVER: Yes, sir.

THE COURT: I don't agree with you. I think it is admissible against Harris and Williamson, so long as Harris is testifying as to what involvement Williamson had during the pendency of the conspiracy. So, I'm going to let it go. I overrule the objection.

MR. SILVER: Thank you, Judge.

THE COURT: Your exception is preserved.

(Chambers Conference Concluded).

THE COURT: You may proceed.

BY MS. FOWLER:

(Jury excused from the courtroom).

(Brief recess).

THE COURT: All right, I have this written down, because I want to be sure I say the right words. The ruling of the Court is that the statements made by defendant Harris to Agent Walton are admissible under 804 B(3), which deals with statements against interest.

First, defendant Harris' statements clearly implicated himself, and therefore, are against his penal interest.

Second, defendant Harris, the declarant, is unavailable.

And third, as I found yesterday, there are sufficient corroborating circumstances in this case to ensure the trustworthiness of his testimony. Therefore, under United States versus Harrell, these statements by defendant Harris implicating defendant Williamson are admissible.

I do not totally understand the logic of the 11th Circuit. However, that is their logic and I am bound by it and I will follow it. That's the ruling of the Court. Bring the jury in.

(The Jury Returned to the Courtroom).

THE COURT: You may proceed.

CROSS EXAMINATION

BY MR. SILVER:

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-8938

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FREDEL WILLIAMSON,
a/k/a "FRED",

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Georgia

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, HATCHETT and ANDERSON, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Gerald M. Tjoflat

UNITED STATES CIRCUIT JUDGE

No. A-942

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

FREDEL WILLIAMSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEAL

ENTRY OF APPEARANCE

THE CLERK will please enter my appearance as Counsel of Record for FREDEL WILLIAMSON, who is the Petitioner in this Court.

I CERTIFY that I am a member of the Bar of the Supreme Court of the United States.

Respectfully submitted,

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No. A-942

IN THE

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OCTOBER TERM, 1992

FREDEL WILLIAMSON,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEAL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the PETITION FOR WRIT OF CERTIORARI, APPENDIX and ENTRY OF APPEARANCE were sent by United States mail, first-class postage prepaid, pursuant to S.Ct.R. 29.3, this 15th day of July, 1993, to: **Charles E. Cox, Jr., Esquire**, Assistant United States Attorney, Post Office Box U, Macon, Georgia 31202, Telephone: (912) 752-3511; and, the **Solicitor General**, Department

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Respectfully submitted,

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